

STATE OF MICHIGAN
COURT OF APPEALS

In re PAUL J. FERRIGAN Revocable Trust.

PATRICIA BROWN, TRUSTEE,

Petitioner-Appellee,

v

JOHN FERRIGAN, TOM FERRIGAN, BARB
WROBEL, and JEAN ROBINSON,

Respondents-Appellants,

and

JANET DARLING and ROSE STEVENS,

Respondents-Appellees.

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Respondents-appellants Ferrigan, Ferrigan, Wrobel, and Robinson appeal as of right from an order of the probate court interpreting decedent's estate documents, which consist of a will, a trust, an amendment to the trust, and an operating agreement for a limited liability company (LLC). We affirm.

This appeal involves the interpretation of decedent's estate documents, as well as the applicable statutes. We review de novo questions of statutory construction, with the fundamental goal of giving effect to the intent of the Legislature. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175, amended on other grounds 468 Mich 1216 (2003). If the language is unambiguous, "the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case." *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159-160; 645 NW2d 643 (2002). "As in the context of statutory interpretation, the core purpose of interpreting wills is to give effect to the drafter's intent, limited only by applicable law," and to that end, the relevant documents are to be read as a whole and harmonized if possible, but plain language should not be overscrutinized. *In re Estate of Bem*, 247 Mich App 427, 433-434; 637 NW2d 506 (2001). Trust documents are construed according to the same rules applicable to

wills. *In re Maloney Trust*, 423 Mich 632, 639; 377 NW2d 791 (1985). Proper interpretation of a contract is also a question of law reviewed de novo with the goal being to determine and carry out the parties' intent. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463, 473; 663 NW2d 447 (2003).

The first question on appeal is whether the operating agreement for Ferrigan Farm, LLC, is valid. We find that it is not.

Decedent was the only member of the LLC when the operating agreement was executed on August 9, 2001. At the time, MCL 450.4102(2)(n) defined "operating agreement" to require more than one member in the LLC. 2000 PA 336. However, 2002 PA 686 amended the statute to allow operating agreements for companies with only one member. MCL 450.4102(2)(q). Simultaneously, the Legislature also enacted MCL 450.4215, which states, "An operating agreement of a limited liability company that has 1 member is not unenforceable because only 1 person is a party to the operating agreement." Thus, the question before us is whether the operating agreement became valid by operation of the statutory changes.

In determining whether a statute should apply retroactively, the intent of the Legislature governs, but statutes are presumed to be prospective absent a clear indication to the contrary. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001). We see nothing in the language of the statute that indicates that the Legislature intended for it to apply retroactively. *Id.* at 584. ("Most instructive is the fact that the Legislature included no express language regarding retroactivity."). Additionally, although "in Michigan, a legislative analysis is a feeble indicator of legislative intent and is therefore a generally unpersuasive tool of statutory construction," *Id.* at 587, we nevertheless note that legislative analysis of the public act indicates a desire to clarify that a single person was thereafter authorized to enter into an agreement with himself despite the apparently illogical nature of doing so. Enrolled Analysis SB 1418, p 5. A remedial statute might be retroactive, but legislation such as this that affects substantive rights is not remedial. *Frank W Lynch & Co, supra* at 585. Thus, every indication is that the Legislature did not intend 2002 PA 686 to apply retroactively.

Respondents-appellants further argue that MCL 450.5102 allows retroactive application of any changes in the law. That section states, "This act may be supplemented, altered, amended, or repealed by the legislature, and every limited liability company subject to this act is bound by the changes." On its face, § 5102 only states that LLCs will be required to comply with any changes the Legislature makes to the MLLCA. As with 2002 PA 686, it contains no retrospective language. We therefore decline to find it a general-purpose statute designed to make any changes to the entire act automatically retroactive.

In the absence of any specific language stating that 2002 PA 686 was to be applied retroactively, considering the fact that it is not remedial in nature, and, notwithstanding its minimally probative nature, we conclude that it was not intended to reanimate invalid operating agreements. The operating agreement here was invalid when it was executed, and it remained that way.

Respondents-appellants argue that the operating agreement should constitute a valid governing document akin to bylaws even if it is not a valid statutory operating agreement. Operating agreements are intended to function as the LLC equivalent of bylaws in a corporation.

Cambridge & Christopoulos, Michigan Limited Liability Companies, 2003 Supplement, § 4.2; O'Neal & Thompson's Close Corporations & LLCs, Revised Third Edition, 2004, § 3:2. Moreover, the Michigan Limited Liability Company Act (MLLCA), MCL 450.4101 *et. seq.*, does not provide for any governing documents other than operating agreements. Although members are free to contract with each other, such documents would only be enforceable against the contracting parties. Thus, only an actual, valid, statutory operating agreement may be used as a governing document for a LLC under the MLLCA. Petitioner was not a party to the operating agreement here. Thus, the operating agreement was not a valid governing document binding on petitioner under the MLLCA.

Respondents-appellants next argue that the amendment to the trust created a mandatory gift that requires petitioner to transfer decedent's farm into the LLC and distribute it to the seven beneficiaries. We disagree.

The relevant original trust language was as follows:

5.2 Specific Gifts. Trustee shall make the following distributions from principal:

none at this time

If any above-named individual does not survive Settlor, or if any above-named organization is not in existence at Settlor's death, such gift or gifts shall fail if there is no substitute beneficiary named. Trustee shall make the distributions at such reasonable times as Trustee deems advisable. No interest shall be paid on any of these gifts. Absent a problem in construing this paragraph, a beneficiary who receives a distribution only under this paragraph is to be informed only of that specific gift and is not to receive any inventory, accounting, or information about gifts to other beneficiaries.

The amendment then provided as follows:

Pursuant to the right reserved to me under the provisions of the above Trust, I amend that Trust as follows:

I amend Article V, 5.2 **Specific Gifts**, by authorizing the following gift:

It is my intention that all my Farm property remaining at my death, currently consisting of 159 acres (in 4 deeds) located in Woodhull Township, Shiawassee County, Michigan, be transferred to my limited liability company, **Ferrigan Farm, LLC**, and that said limited liability company then be distributed according to Article V, 5.4 **"Balance of Property"**, of this Trust.

The word "shall" is unambiguously mandatory. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002). However, to "authorize" refers to granting authority, permission, or approval, so it is not mandatory. See *Random House Webster's College Dictionary* (1997) and

Black's Law Dictionary (7th ed). The plain language of the amendment therefore permits the gift of the farm to the LLC but does not require it.

“The intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly conceived, and it is not contrary to some positive rule of law, it must prevail.” *Foster v Stevens*, 146 Mich 131, 136; 109 NW 265 (1906), quoting *Finlay v King's Lessee*, 28 US (3 Pet) 346, 363; 7 L Ed 701 (1830). That intention is to be determined by reading the relevant documents as a whole. *In re Ives' Estate*, 182 Mich 699, 704; 148 NW 727 (1914).

When the amendment is read as a whole, respondents-appellants' argument that it was intended to augment, rather than replace, § 5.2 in the trust is clearly correct. It states that it is an amendment, and it specifies no deletions or replacements. Thus, the language “Trustee shall make the following distributions from principal” in the original trust was unchanged by the amendment. Accordingly, when the trust and trust amendment are read together as a single instrument, the result is that the trust states that the trustee *shall* make “no gifts at this time” and *may* make one gift of the farm. Thus, the trust amendment creates a precatory gift only.

MCL 450.4504 states that membership in an LLC is personal property. Decedent's membership would pass into the trust through his will as a piece of intangible personal property. Thus, in an indirect sense, petitioner would be the only member, albeit only in her capacity as trustee and personal representative, with the sole fiduciary responsibility for managing that membership as a business interest under § 6.23 of the trust. Respondents-appellants cite to MCL 450.4401(a) for the proposition that petitioner must also be a manager, but managers, not members, manage the LLC, so MCL 450.4401 explicitly does not apply. Under MCL 450.4502(4)(a), the members may authorize dissolution of the company. MCL 450.4801(c) states that this may be done “[u]pon the unanimous vote of all members entitled to vote.” Because she is functionally the only member, she is authorized to do so by herself.

Because petitioner is not obligated to distribute the LLC or place the farm into it, the LLC may remain unfunded and valueless. Under § 7.14 of the trust, petitioner may abandon an asset that is valueless or otherwise not beneficial to the trust. Thus, the trial court correctly found petitioner authorized to dissolve the LLC or abandon it.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Talbot
/s/ Stephen L. Borrello